Journal of Indian Research (ISSN: 2321-4155)
Volume 10, Number 3&4, July-December, 2022

PROCEDURAL FAIRNESS IN ADMINISTRATIVE DECISIONS AND RIGHTS OF NON-CITIZENS IN AUSTRALIA

Dr. Hassan Al Imran*

ABSTRACT

Procedural fairness is an important element in any administrative decision. A person may apply for a judicial review if it is believed that fair procedure has not been followed during the adjudication process. In Australia, the Kioa vs. West (1985) judgement is a milestone in procedural fairness cases. In practice, non-citizens face many administrative decisions in Australia across various aspects; however, if the aggrieved party believes that procedural fairness was not followed by the administrative character during the decision-making process, then the aggrieved party may go to the higher court for a review of the decision. This begs the question: How can procedural fairness be ensured in an administrative decision? What features must be considered by a decision maker in an administrative decision? What is the role of the court in ensuring justice for non-citizens? The aim of this article is to examine procedural fairness in Australia in an administrative decision and the roles of the courts in the context of non-citizens to ensure justice and procedural fairness.

Keywords: Judicial review, Bias, Non-citizens, Procedural Fairness, Non-Refoulement.

INTRODUCTION

Procedural fairness stands as a fundamental cornerstone within the framework of the rule of law and administrative rulings. This principle is equally underscored by international human rights law, which unequivocally stipulates that every individual, irrespective of their citizenship status, is entitled to the full spectrum of human rights. This encompasses the right to a fair trial, free from any form of discrimination.[1]

In straightforward terms, within the realm of administrative law, procedural fairness denotes the equitable handling of an impartial verdict within an administrative procedure overseen by an administrative entity. Ensuring procedural fairness stands as an essential prerequisite for any decision-making process, constituting a pivotal component of the overarching concept of the rule of law. In the words of Professor S. A.de Smith:

***Dr. Hassan Al Imran** is an Assistant Professor, Department of Law, Independent University, Bangladesh (IUB). He has earned an LL.M in International Law (UWE) and a PhD in Law (WSU). E-mail: hassan.alimran@iub.edu.bd.

Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position: (a) to make representations on their own behalf; or (b) to appear at a hearing or inquiry (if one is to be held); and (c) effectively to prepare their own case and to answer the case (if any) they have to meet.[2]

The procedural fairness of a decision-making process also leads to justice and supports sound decision-making. Chief Justice Robert French states that:

A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power.[3]

In common law, natural justice involves two basic requirements: a fair hearing and free of bias (impartial). In *Re Minister for Immigration and Multicultural Affairs, ex parte Lam (Lam),* Callinan J noted that 'natural justice by giving a right to be heard has long been the law of many civilised societies.'[4] Moreover, the High Court in the *Plaintiff M61/2010E* case held that, in every issue, procedural fairness needed to be ensured by the administrative decision maker; it is irrelevant whether the obligation of procedural fairness arises either from common law or statutes.[5] The High Court in *Plaintiff S10/2011* declared:

The 'common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.[6]

Any person may seek judicial review on an administrative decision if the requirement of procedural fairness has not been met in the decision-making procedure. The right of procedural fairness is guaranteed in the Constitution of Australia as well as its statutes. Article 75(v) of *The Australian Constitution 1900* states that the High Court of Australia has original jurisdiction in matters regarding the writ of Mandamus or prohibition or injunction against an officer of the Commonwealth. Moreover, s. 39B of *Judiciary Act 1903 (Cth)* and s. 5(1) (a) of *Administrative Decisions (Judicial Review) Act 1977 (Cth)* detail the procedures of judicial review of an administrative decision.

The right of judicial review on administrative decisions is also established by case laws. Most notably, in *Minister for Immigration and Border Protection vs WZARH,* the High Court held that in 'the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions.'[7] However, in certain situations as exceptions, procedural fairness may not be applied, for example, if there are too many people involved or if there is any bar under statutory provisions.[8] In common law, courts examine two issues regarding the denial of procedural fairness: (i) whether a duty to afford procedural fairness exists, and (ii) if such a duty exists, whether procedural fairness is ensured in the particular case.

In addition, the legal obligation to ensure procedural fairness not only derives from

the statutory obligation; it also arises under common law.[9] However, in many decisions, procedural fairness is not directly expressed but is indicated under implied obligation. In this context, Justice Deane's comments in *Kioa vs. West*[10] are notable. Justice Deane states:

> *In the absence of a clear contrary legislative intent, a person who is entrusted with statutory power to make an administrative decision which directly affects the rights, interests, status, or legitimate expectations of another in his individual capacity (as distinct from as a member of the general public or of a class of the general public) is bound to observe the requirements of natural justice or procedural fairness*.[11]

In the *Re Refugee Tribunal, ex parte Aala*,[12] the High Court of Australia decided that the refugee tribunal failed to ensure procedural fairness, and as a result, the tribunal decision should be reviewed under s 75(v) of the Australian Constitution.

In general, the rights of citizens are guaranteed by the constitution and laws of a State. If procedural fairness is not ensured by any government official in any decision-making process, then the decision may be challenged. However, in many cases, non-citizens (international students, foreign workers, or immigrants) also face administrative and judicial decisions by the country/government officials of the court of domicile. In the decision-making process, if procedural fairness is not followed, the lives and legal status of non-citizens may be affected. For example, they may be forced to leave the county or face a penalty or fine. In such a situation, if the appeal is allowed, the rights of non-citizens would be ensured by the court.

Therefore, the aim of this paper is to examine procedural fairness in Australia, particularly how the rights of non-citizens can be ensured by the Australian courts and what example the Australian courts are setting for the rest of the world in this regard. In doing so, the paper will first define the meaning of procedural fairness in Australia. Secondly, it asks what are the common law rules in this aspect, and thirdly, what are the exceptions to it. Fourthly, the paper discusses the *Wei case* and some other leading case laws in relation to the rights of non-citizens in procedural fairness. Finally, there is a conclusion to the discussion.

PROCEDURAL FAIRNESS AND LEGITIMATE EXPECTATION

'Procedural fairness' means fair acts in an administrative decision-making process. There is no fixed element in procedural fairness. Procedural fairness depends on the nature of each case and in the appropriate circumstances. According to the common law, there are three rules of procedural fairness which ensure natural justice. The rules are: (1) the right to a fair hearing (*audi alteram partem*); (2) no bias (*nemo in iudex sua causa*); and (3) no evidence (the decision must be based upon logically probative evidence).[13] In *Board of Education vs. Rice,*[14] the UK court held that 'acting in good faith and fairly listening to both sides' ensures procedural fairness.

A person denied procedural fairness can appeal to the Federal Court against the decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJL Act) in Australia. The ADJL Act allows for judicial review if there is a judicial error. Sections 5, 6, and 7 of the ADJL Act provide the grounds for judicial review. The grounds are: (i) breach of natural

justice, (ii) *ultra vires*, (iii) no jurisdiction, (iv) no evidence, and (v) error of law.

It is a legitimate expectation that the administrative decision-maker will act fairly in all the circumstances of a case during the decision-making process. In the UK, *Schmidt and Another vs. Secretary of State for Home Affairs,*[15] the plaintiffs arrived in England to study, but later, the plaintiffs complained that their student visas had not been extended, thus they were unable to complete their studies. In the *Schmidt and Another case*, Lord Denning ruled that it was a legitimate expectation that a public authority should work fairly to ensure natural justice. Lord Denning also remarked that:

> *Where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf.*[16]

In Australia, the term 'legitimate expectation' was used originally in *Salemi vs. MacKellar (No. 2),*[17] where the court held that it was a legitimate expectation that the court would ensure procedural fairness to protect the rights of an individual. Alternately, if there is a denial of fairness, ignorance of duty, or a manner that adversely affects the rights of an interested party, it would be good grounds for review. In *NAFF vs. Minister for Immigration and Multicultural and Indigenous Affairs*[18] in the Refugee Review Tribunal, the tribunal judge reached a decision without asking any further questions of the applicant. However, earlier, during the review process, the tribunal judge informed the applicant that he needed further information to reach a verdict. Later, in the appeal process, the High Court held that while the tribunal decision was made without the proper hearing and inquiry, procedural fairness was denied to the appellate.[19] On the one hand, in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam,*[20] the High Court held that if the act of the administrative decision-maker does not affect the decision, or there is no 'practical content' of the act, there is no violation of procedural fairness. Gleeson CJ expressed that:

> *But what must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation. In some contexts, the existence of a legitimate expectation may enliven an obligation to extend procedural fairness. In a context such as the present, where there is already an obligation to extend procedural fairness, the creation of an expectation may bear upon the practical content of that obligation. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness, not whether an expectation has been disappointed.*[21]

On the other hand, the 'legitimate expectation' of procedural fairness may be excluded by clear and unambiguous legislation.[22] In *Plaintiff S10/2011 vs. Minister for Immigration and Citizenship*,[23] the plaintiffs (non-citizens) applied for several forms of relief (including certiorari) against the Minister for Immigration and Citizenship and the Secretary of the Department of Immigration and Citizenship. The plaintiffs argued that it was a legitimate expectation that the Minister should ensure procedural fairness. However, under the statute, the Minister had no obligation to apply his discretionary power to any decision. The Ministerial power can only be exercised by the Minister personally in exceptional cases;

the Minister cannot be compelled to exercise it. The High Court dismissed the plaintiffs' applications and held that the distinct nature of the powers conferred to the Minister by the *Migration Act 1958 (Cth)* meant that the exercise of the powers was not conditioned on the observance of the principles of procedural fairness. Moreover, while there is no fixed content of duty to ensure procedural fairness, it depends on the particulars of the case.[24] In *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*, Gleeson CJ observed that:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*[25]

Therefore, according to the statute law and common law, if there is any breach of natural justice, *ultra vires*, no jurisdiction of the court, no evidence, or error of law, the affected party holds the right to seek recourse through judicial review against the administrative decision.

KIOA VS. WEST IN PROCEDURAL FAIRNESS AND COMMON LAW TRADITION

In common law, it is a legitimate expectation before making any decision that the administrative decision maker should be given a fair opportunity of hearing all the parties of the case.[26]

In modern administrative law, the *Kioa vs. West* decision is a milestone judgement in Australia that provides guidelines/approaches to procedural fairness for administrative decisions. In the *Kioa vs. West* case, Justice Mason noted that:

> *The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention*.[27]

It has already been noted that according to the common law tradition, there are three rules of procedural fairness: the right to a fair hearing, no 'bias' rule, and 'no evidence' rule.[28] In Australia, the *Minister for Immigration and Multicultural Affairs vs. Bhardwaj*, the High Court of Australia held that if there is any breach of the rules of procedural fairness, then there would be a 'jurisdictional error,' and the decision would be unlawful.[29]

Under the common law of hearing rule, the administrative decision-maker is bound to hear the affected person before delivery of any decision.[30] The hearing rule includes the right to receive notice of hearing, the right to legal representation, the right to have an interpreter, the right to make submissions (oral and/or written), and the right to give adequate time to submit the claim.[31] In the *Re Refugee Tribunal, ex parte Aala,* the High Court of Australia held that an administrative decision-maker should not make a decision on an undisclosed issue.[32] In *ex parte Lam,* the High Court also held that, before making any administrative decision, the decision maker should bring the critical issue to the parties that are affected by the decision.[33] In general, the hearing rule should be applicable in all decisions. However, in some situations, according to the facts of a particular case, the hearing rule is not applicable.

If the decision involves a 'purely administrative' matter in that situation, the hearing rule is inapplicable.[34] Moreover, in the straightforward master-servant relationship, there is no application of the no-hearing rule.[35] However, if there is 'unfair dismissal,' then the employee should be given an adequate opportunity for defence.[36] On the other hand, if the decision affects too many people[37] and/or 'national security,'[38] then the right of hearing is not applicable.

In the 'bias rule' of procedural fairness, the theory is '*nemo debet esse judex in propria causa*' (Latin term), that is, 'no one can be judged in his or her own cause.'[39] Accordingly, a decision maker will deliver the judgement impartially.[40] In *R vs. Sussex Justices, ex parte McCarthy,* Lord Hewart CJ stated that it was 'fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.'[41] In Australia, the *Johnson vs. Johnson* case defines the principle of bias test as:

> *In Australia, in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.*[42]

In common law, the courts consider three tests to determine whether an administrative decision would be void or not: (i) the 'real likelihood' of bias test; (ii) the 'reasonable suspicion' (or 'reasonable apprehension') of bias test; (iii) the 'actual' bias test.[43]

First of all, the bias must be real. If there is 'real likelihood,' there is no 'bias.'[44] In *R vs Australian Stevedoring Industry Board, ex parte Melbourne Stevedoring Co Pty Ltd,* the High Court held that:

> *Bias must be 'real'. The officer must so have conducted himself that a high probability arises of bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons.*[45]

Secondly, under the 'reasonable suspicion' (also known as 'reasonable apprehension') of the bias test, the principle is that - there must be a material connection between the interest of the judge and the result of the case.[46] In *Sun Zhan Qui vs. Minister for Immigration and Ethnic Affairs,* the court held that an allegation of 'actual bias' cannot be made lightly. It is something more than unreasonableness, error, or lack of logic and more than an 'apprehension of bias.' A party declaring actual bias carries a heavy burden.[47] If someone accuses an administrative character of bias in the decision-making process, the allegation must be distinctly made and clearly proven.[48] A judge would only be disqualified for actual bias when a party establishes that the judge of a decision is so committed to a particular outcome that he or she would not alter that outcome, regardless of what evidence is presented before him/her.[49] However, in certain circumstances, the bias test is waived under the 'doctrine of necessity'; for example, if the main witness is unavailable or under statutory grounds.[50]

Thirdly, under the principle of procedural fairness, it is expected that an administrative decision-maker must make a decision based on what was logically presented in the case

rather than on mere speculation or suspicion. Therefore, the 'no evidence' rule means that the probative evidence was not properly presented before the decision maker; thus, it was a biased decision.[51] It is a violation of natural justice if there is no evidence to support the decision of a case.[52]

Therefore, if the rules of procedural fairness are not followed in a decision-making process, it amounts to 'jurisdictional error,' which means that the decision is invalid.[53] However, as an exception, if the court is satisfied that the breaches of procedural fairness do not affect the decision, then there is no breach.[54]

EXPECTATION OF PROCEDURAL FAIRNESS

In certain circumstances, a statute may exclude the procedural fairness obligation.[55] Thus, during the interpretation of a statute, courts consider that parliament did not intend to exclude procedural fairness unless the intention was unambiguously clear.[56] In fact, the exclusion of the principles of natural justice can only occur by 'plain words of necessary intendment.'[57] However, the Administrative Review Council brought (or offered) an opposing view on excluding the procedural fairness rule. The Council said that 'procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances.'[58] Nevertheless, the High Court held that the exclusion of procedural fairness is justified under 'the proportionality test.'[59]

However, parliaments, often in practice, expressly exclude the procedural fairness obligation by statutes. These include, for example, corporate and commercial regulations,[60] migration law,[61] and the exercise of maritime powers.[62] Moreover, the exclusion of natural justice has also been observed in prison administration, where the prison officer, in good faith, suspected that there would be a violation of law and riot.[63]

PRIVATIVE CLAUSE AND JUDICIAL REVIEW

In *Plaintiff S157/2002 vs. Commonwealth,* the High Court delivered a remarkable decision in the judicial review of the privative clause issue.[64] The privative clause is a statutory provision under which, in some situations, a statute expressly excludes/restricts the right to appeal against any judicial review. In *Plaintiff S157,* the plaintiff sought to challenge the decision of a visa refusal, but the right was barred by section 474 of the *Migration Act 1958 (Cth)*. The plaintiff then challenged the validity of section 474. The High Court held that an administrative decision that involves jurisdictional error is 'no decision at all.'[65] Thus, if there is a jurisdictional error, the decision in question cannot properly be described in terms of 'a decision'.[66]

Hence, while it is possible for the parliament to enact a law with a privative clause in exceptional circumstances, the court retains the authority to set aside such a clause if it fails to guarantee procedural fairness.

In the subsequent section, the article directs attention to prominent cases concerning non-citizens and judicial reviews in Australia. It scrutinizes how the courts are approaching the issue of procedural fairness to uphold the principles of natural justice.

CASE LAWS

Wei vs. Minister for Immigration and Border Protection,[67] is the most recent and notable case in Australia regarding visa cancellation and procedural fairness. As to the facts of the case, Mr. Wei was a Chinese national who arrived in Australia in 2008 under a student visa, completing his schooling in Australia in 2011. Later, in March 2012, Mr Wei was granted a fresh student visa after enrolling in a new 'Foundation Program' at Macquarie University. Mr. Wei's study program was supposed to start in June 2013. The university issued a 'Letter of Enrolment' to him in relation to that course, and Mr Wei successfully completed the course in June 2014. However, the university failed to record Mr Wei's enrolment in an electronic database known as the Provider Registration and International Student Management System (PRISMS), which is a mandatory requirement of the Department of Immigration and Border Protection. When the Department of Immigration checked the status of Mr. Wei through this electronic database, they found that Mr. Wei had failed to enroll in the study program and so had breached the conditions of his student visa. The immigration department sent two letters (February 2014 and March 2014) to Mr Wei to notify him of the cancellation of his student visa and invited him to explain his status. However, the letters were returned on both occasions as 'unclaimed.' Accordingly, the Department of Immigration cancelled his student visa. Mr Wei only noticed the cancellation of his visa in October 2014, after the time to appeal the decision had lapsed. In fact, his university failed to record and update Mr Wei's mandatory information in PRISMS; thus, the letters did not reach Mr Wei. Mr Wei later appealed against the decision of the Department of Immigration, taking it to the High Court and claiming that the failure to input his record was not his fault but that of the university. The decision was therefore taken by the Department of Immigration without a fair hearing, he claimed, which breached natural justice and procedural fairness. In the final verdict, the High Court of Australia allowed Mr Wei's appeal, his time of appeal was extended, a writ of prohibition was issued against the defendant, and the defendant was ordered to pay the plaintiff's costs of the application.

In the *Zhang case,*[68]- Zhang de Yong was a citizen of China who had arrived in Australia by boat. After his arrival, Zhang was interviewed by a junior officer of the Department of Immigration on two occasions but *not* by the senior officer of the Department who made the final decision. Also, Mr Zhang spoke in Mandarin. In the appeal, Zhang also raised that although an interpreter was present on each occasion, they spoke Cantonese, not Mandarin; therefore, the interpretations misquoted his actual statement. Mr Zhang appealed for the right to procedural fairness to the Federal Court of Australia, and his appeal was allowed. In the judgement French J noted that:

> *Procedural fairness will require that the inquiry process allow for the difficulties of language and communication inherent in the subject matter of such applications, and no doubt in many cases compounded by the uncertainties and stress suffered by individual applicants. Interview processes, which involve the use of interpreters and the checking of written records of interviews are calculated to meet with some of those difficulties.*[69]

In *Minister for Immigration and Multicultural Affairs vs. Khawar,*[70] the High Court of Australia provided a border definition of refugee in relation to a gender-based refugee claim. The court ruled that the definition of refugee included the Pakistani woman who

was discriminated against under 'personal reason.' By doing so, the High Court overturned the decision of the Immigration Tribunal and allowed Mrs. Khawar's appeal. Gleeson CJ remarked in the case:

> *That [persecution] conduct was not for reasons of race, religion, nationality, political opinion, or membership of a particular social group, even if women constituted such a group. It was for personal reasons. On that approach, the attitude of the Pakistani police, or of the Pakistani state, was incapable of turning the inflicting of harm for reasons having nothing to do with any of the grounds set out in Art 1A(2) into persecution for one of the reasons stated.*[71]

The *Chen Shi Hai vs. The Minister for Immigration and Multicultural Affairs* involved a little child. Chen Shi Hai was 3½ years old and was born in an Australian immigration detention centre. His parents' marriage had been unauthorised and unrecognized in China due to their being underage; they also later violated China's 'One Child' policy by having two children (one son and one daughter). Chen Shi Hai's parents had arrived illegally in Australia and were held in an immigration detention centre, where Chen Shi Hai was born. Chen Shi Hai applied for a protection visa, claiming refugee status, because if he went back to China, he would be treated as a 'black child' (illegitimate child) and would face persecution due to his status. The Immigration Tribunal refused Chen Shi Hai's application, while his parent's protection visa was also refused. The High Court observed that 'black children' are distinct from children in general, and the question was – 'whether 'black children' can constitute a 'social group.'[72] In the final verdict and conclusion, the High Court of Australia allowed the appeal and held that:

> *The Full Court erred in holding that 'black children' could not constitute a social group for the purposes of the Convention and, also, in holding that the adverse treatment which the appellant was likely to experience in China was not by reason of his being a 'black child' but because his parents had contravened China's 'one-child policy'. It follows that the appeal must be allowed.*

However, in *WZARV vs. Minister for Immigration and Border Protection,*[73] the claimant was a Sri Lankan citizen who entered Australia by boat and was taken to Christmas Island for detention. His application for a protection visa (claiming refugee status) was denied. Later, The Independent Merits Reviewer (IMR) also rejected his refugee application. Then, the claimant sought a judicial review of the IMR's decision in the Federal Circuit Court, but his application was also rejected by the Court. Thereafter, he appealed to the Federal Court and claimed he would face 'serious harm' from the Sri Lankan authorities at the airport upon his return. The Federal Court, in the final verdict, held that the IMR's decision regarding WZARV's claims did not vitiate procedural fairness, as his temporary detention at the airport would not constitute 'serious harm' as per the international human rights norms.[74]

The *CLI16 vs. Minister for Immigration and Border Protection* [2020] is also a notable case in relation to the rights of non-citizens, where the appeal was allowed in the Federal Court of Australia.[75] The appellant was a Bangladeshi citizen who was a 'low-level supporter' of the opposition party, and his older brother held a 'prominent role' in the same party. The

appellant claimed that his older brother was shot and killed by members of the ruling party because of his involvement with the opposition political party. The Appellant said that he attempted to make a complaint to the police about his brother's murder, but he was beaten by members of the ruling party as a result. Following this incident, the Appellant claims he fled Bangladesh to save his life, and he arrived in Australia as an illegal maritime arrival. However, his protection visa application was rejected by the case worker, the Administrative Appeals Tribunal, and the Federal Circuit Court. Although the tribunals accepted that the appellant had a well-founded fear of persecution if he returned to his hometown. But if the appellant moves to a different town/city in Bangladesh, he will face no persecution.

The case revolved around whether the Administrative Appeals Tribunal adequately assessed whether relocating the appellant to a different region of Bangladesh was reasonable. The court examined whether the appellant's individual circumstances were genuinely and practically taken into account. The appellant had expressed concerns regarding family support, availability of employment, and potential danger from members of the ruling political party. The Federal Court of Australia held that there was a 'jurisdictional error' in the tribunal decisions. The judge of the Federal Court, Anastassiou J, noted that:

> *I consider that the Tribunal fell into error by failing to engage in the "fact-intensive analysis" required when assessing whether relocation within Bangladesh was reasonable and practicable. It was not apt to compare the Appellant's circumstances in Australia, in which he lived without family support, to those that he would experience in an unfamiliar part of Bangladesh. It was also not sufficient for the Tribunal to dispose of the issue by concluding that the Appellant's family would be able to travel to visit him, without having identified the area in question and considered whether it was reasonable for the Appellant to reside in that area* (para. 47).

The Federal Court of Australia allowed the appeal. This implies that the court found in favour of the appellant's arguments, suggesting that the Administrative Appeals Tribunal had not properly considered the reasonableness of relocating the appellant within Bangladesh while taking into account the appellant's personal situation and concerns about family, employment, and potential threats from political groups. The court's decision thus indicated a failure on the part of the Administrative Appeals Tribunal to adequately address these critical aspects in their assessment. By doing so, the Federal Court ensures Australia's international treaty obligations, the *non-refoulement* principle, which 'impacts upon Australia's reputation and standing in the global community' (para. 82).

In sum, the above discussion reveals that on many occasions, the High Court and the Federal Court of Australia overturned the decisions of lower courts/tribunals, which were delivered under a lack of procedural fairness and /or erroneous conclusions. Accordingly, the rights of non-citizens were ensured.

CONCLUSION

Procedural fairness is an important obligation in any administrative decision-making process for a decision-maker. The obligation is ensured by the Australian Constitution, the statutes, and common laws. Under common law, the three rules ensure procedural fairness:

fair hearing, no bias, and no evidence. In general, if an administrative decision-maker considers the three rules during a decision-making process, it is expected that procedural fairness has been followed and the rule of law will be ensured. Thus, on many occasions, the higher courts of Australia have reviewed the decisions of various administrative bodies as well as of the lower courts, extending the scope of procedural fairness and overturning the earlier decisions (*ex parte Aala, ex parte Lam, Saeed case, Annetts vs McCann*). However, in some situations, the statutory provisions try to limit the scope of procedural fairness, although the courts also stand as a safeguard for procedural fairness to protect the aggrieved party. In particular, in *Plaintiff S157/2002,* the High Court held that if there is any jurisdictional error, the court's duty is to ensure procedural fairness, even if the statute imposes any bar/limitation to challenging the administrative decision. Most notably, in the *Wei case,* the High Court of Australia declared that if there was any judicial error that was beyond the control of the victim, then the earlier decision should be reviewed. By doing so, the courts of Australia are becoming a role model for the world with respect to procedural fairness and ensuring natural justice to non-citizens. It demonstrates that even though there is no human rights provision in the Constitution of Australia and no specific human rights act in Australia, however, under the process of judicial review and procedural fairness, the rights of non-citizens are ensured in Australia.

REFERENCES

1. Article 2 (1) of the 1948 Universal Declaration of Human Rights states: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2 (1) of International Covenant on Civil and Political Rights 1966 provides: Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of International Covenant on Civil and Political Rights 1966 also provides: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
2. S A de Smith, *Judicial Review of Administrative Action* (Stevens & Sons, London, 2nd ed.) 180-181.
3. Chief Justice Robert French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25, 47.
4. *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1, [140].
5. *Plaintiff M61/2010E vs. Commonwealth* (2010) 243 CLR 319, [74].
6. *Plaintiff S10/2011 vs. Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97].

7. *Minister for Immigration and Border Protection vs WZARH* [2015] HCA 40 [30].
8. *Minister for Arts, Heritage and Environment vs Peko-Wallsend Ltd* (1987) 15 FCR 274.
9. *Salemi vs. MacKellar (No. 2)* (1977) 137 CLR 396.
10. *Kioa vs. West* (1985) 159 CLR 550.
11. *Kioa vs. West* (1985) 159 CLR 550.
12. *Re Refugee Tribunal, ex parte Aala* (2000) 204 CLR 82.
13. Francisco Esparraga, & Ian Ellis-Jones, *Administrative Law Guidebook* (Oxford University Press, 2016) 73-74.
14. *Board of Education vs. Rice* [1911] AC 179.
15. *Schmidt and Another vs. Secretary of State for Home Affairs* [1969] 2 Ch 149.
16. Ibid.
17. *Salemi vs. MacKellar (No. 2)* (1977) 137 CLR 396.
18. *NAFF vs. Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA 62.
19. *Applicant NAFF of 2002 vs Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 211 ALR 660.
20. *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1.
21. Ibid [34].
22. *Medway vs. Minister for Planning* (1993) 80 LGERA 121.
23. *Plaintiff S10/2011 vs. Minister for Immigration and Citizenship* (2012) 246 CLR 636.
24. *Kioa v West* (1985) 159 CLR 550, 585.
25. *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1 [37].
26. Peter Cane, Leighton McDonald & Kristen Rundle, *Principles of Administrative Law* (3rd, 2018, OUP) 150.
27. *Kioa vs. West* (1985) 159 CLR 550, 584.
28. Esparraga & Ellis-Jones, *Administrative Law Guidebook* (Oxford University Press, 2016) 73-74.
29. *Minister for Immigration and Multicultural Affairs vs. Bhardwaj* (2002) 209 CLR 597.
30. *Twist vs Randwick Municipal Council* (1976) 136 CLR 106.
31. Esparraga & Ellis-Jones, *Administrative Law Guidebook* (Oxford University Press, 2016) 81-82.
32. *Re Refugee Tribunal, ex parte Aala* (2000) 204 CLR 82.
33. *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1.

34. *Lovelock vs. Secretary of State for Transport* [1979] JPL 456.

35. *Ridge vs. Baldwin* (1964) [1964] AC 40.

36. *Nicolson vs. Heaven & Earth Gallery Pty Ltd* (1994) 126 ALR 233.

37. *Essex CC vs. Ministry of Housing and Local Government* (1967) 66 LGR 23.

38. *Council of Civil Service Unions vs. Minister for the Civil Service* [1985] AC 374.

39. Esparraga & Ellis-Jones, *Administrative Law Guidebook* (Oxford University Press, 2016) 97.

40. *Webb vs. The Queen* (1994) 181 CLR 41.

41. *R v Sussex, ex parte McCarthy* [1924] 1 KB 256

42. *Johnson vs. Johnson* [2000] HCA 48 [11].

43. Esparraga & Ellis-Jones, *Administrative Law Guidebook* (Oxford University Press, 2016) 97-98.

44. *R vs. Rand* (1866) LR 1 QB 230.

45. *R vs. Australian Stevedoring Industry Board, ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100.

46. *Ebner vs. The Official Trustee in Bankruptcy* (2000) 205 CLR 337.

47. *Sun Zhan Qui vs. Minister for Immigration and Ethic Affairs* (1997) 81 FCR 71.

48. *Minister for Immigration and Multicultural Affairs vs. Jia Legeng* (2001) 205 CLR 507.

49. Ibid.

50. *Ebner vs. The Official Trustee in Bankruptcy* (2000) 205 CLR 337.

51. *Australian Broadcasting Tribunal vs. Bond* (1990) 94 ALR 11.

52. *Haider vs. JP Morgan Holdings Aust Ltd* [2007] NSWCA 158.

53. *Minister for Immigration and Multicultural Affairs vs. Bhardwaj* (2002) 209 CLR 597.

54. *Re Refugee Tribunal, ex parte Aala* (2000) 204 CLR 82.

55. Esparraga & Ellis-Jones, *Administrative Law Guidebook* (Oxford University Press, 2016) 86.

56. *Saeed vs. Minister for Immigration and Citizenship (2010)* 241 CLR 252, [15]; also, *Kioa vs. West* (1985) 159 CLR 550, 584.

57. *Annetts vs. McCann* (1990) 170 CLR 596, 598.

58. Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006) 52.

59. *McCloy vs. New South Wales* [2015] HCA 34.

60. *Corporations Act 2001 (Cth),* s. 739, 915B.

61. *Migration Act 1958 (Cth)* s. 501.

62. *Maritime Powers Act 2013 (Cth)* ss. 9, 69A, 75B
63. *McEvoy vs. Lobban* [1989] QSCFC 135.
64. *Plaintiff S157/2002 vs. Commonwealth* (2003) 211 CLR 476.
65. Ibid [78].
66. Ibid.
67. *Wei vs. Minister for Immigration and Border Protection* [2015] HCA 51.
68. *Zhang De Yong vs. Minister of Immigration, Local Government and Ethnic Affairs* 45 FCR 384.
69. Ibid. [49].
70. *Minister for Immigration and Multicultural Affairs vs. Khawar* [2002] HCA 14.
71. Ibid, [13].
72. *Ibid.* [19-22].
73. *Wzarv vs. Minister for Immigration and Border Protection & Anor* [2015] HCA 22.
74. Ibid [97].
75. *CLI16 v Minister for Immigration and Border Protection* [2020] FCA 1769 (10 December 2020).